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SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

No. 96.

HENRY HUBLER,

Plaintiff in Error,

vs.

THE NEW YORK AND HARLEM RAILROAD COMPANY
AND
THE NEW YORK CENTRAL AND HUDSON
RIVER RAILROAD COMPANY,

Defendants in Error.

Brief for Defendants in Error, on Re-Argument.

IRA A. PLACE,
Attorney for Defendants in Error.

THOMAS KENNY,
Of Counsel.

Supreme Court of the United States.

HENRY MUHLKER,
Plaintiff in Error,

vs.

THE NEW YORK AND HARLEM RAILROAD COMPANY

and

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendants in Error.

October Term, 1904
No. 99.

BRIEF FOR DEFENDANTS IN ERROR, UPON RE-ARGUMENT.

This cause was argued orally before this Court on the 12th and 13th days of December, 1904.

Thereafter, upon permission granted by the Court, on January 3d, 1905, Defendants in Error filed an additional brief.

Thereafter, on January 23d, 1905, this Court directed a re-argument of the cause.

Counsel for Defendants in Error conceive that, in the briefs heretofore submitted, the facts have been fully stated, and that sufficient reference has been made to the authorities which should govern in reaching a correct conclusion of this controversy.

The case, however, is undoubtedly one which must stand upon its own peculiar facts, and we may possibly render some slight aid to the Court if we are able to state, clearly and in order, the facts upon which the State Court based its final determination.

And first it may be well if we can have clearly in mind the point of difference between the parties.

The Plaintiff is the owner of a lot abutting on Park Avenue. As appurtenant to that lot, he claims certain easements—as the right of light, air and access—over Park Avenue. The Defendants do not deny that he has certain easements as appurtenant to his property abutting on Park Avenue. The difference between the parties is simply as to the character and extent of these easements. The Plaintiff claims that these easements are of the same unlimited character and extent as they would have been if Park Avenue had been originally opened to its full width of 140 feet, under the Act of 1813, either without any railroad being upon this strip or as it would have been in case the City, at the time of the opening of the Avenue, had acquired all of the railroad and property rights of the Defendant and had caused the railroad to be wholly removed from the Avenue, as opened. In other words, he claims that he has the same unlimited easements in Park Avenue as an abutting property owner on Third Avenue or Sixth Avenue has over those avenues, which were opened, constructed, regulated, graded and paved long before the construction of the elevated railroads in those Avenues. The Defendants, on the other hand, claim that, by reason of all the facts which constitute the history of Park Avenue and of Defendants' railroad, such easements as Plaintiff has in Park Avenue are so limited in character and extent that Defendants' railroad may be operated therein in the form which has been authorized and required by the Legislature; that, whatever the character and extent Plaintiff's easements are, they are subject to the power of

the Legislature to determine the form and character of railroad operations within the lines of Park Avenue and subject to the right of Defendants to maintain and operate their railroad in accordance with such legislative determination.

The Plaintiff in Error here is one of about 175 plaintiffs, property owners abutting on Park Avenue, against the same defendants. They all came into the New York State Court, on its Equity side, for the purpose—and for the sole purpose—of having their alleged damages admeasured. Their very plain and simple proposition was: The defendants were operating their railroad on an elevated structure in Park Avenue; the railroads of the elevated railroad companies were being operated on elevated structures in Third and Sixth Avenues; the elevated railroad companies had been held liable to the owners of property abutting on Third and Sixth Avenues; therefore, the defendants were liable to owners of property abutting on Park Avenue. They were, however, at once met with the defendants' contention not only that Park Avenue and the easements appurtenant to property abutting thereon were other and different from Third and Sixth Avenues and the easements appurtenant to property abutting thereon, but that the relations of the defendants to the structure complained of were other and different from the relations of the Elevated Railroad Companies to the structures in Third and Sixth Avenues. This was the principal issue litigated in all the State courts. The facts upon which the question has turned are all conceded. They are embodied in acts of the Legislature, ordinances and proceedings by and on behalf of the City, various deeds and other instruments in writing, use and occupation by the defendants. The main question involved, therefore, was purely a question of law.

The only disputed question of fact involved in the controversy was as to whether or not plaintiff had sustained any actual damage; plaintiff claiming that he had sus-

tained substantial damage and defendants claiming that he had suffered no actual damage whatsoever, the advantages resulting from the changes wrought, under the Act of 1892, offsetting, or more than offsetting, any possible disadvantages.

The trial court decided against defendants on both questions; that is, it held that plaintiff had sustained actual damage, and it further held that such damage was an actionable injury and gave judgment for money damages accordingly, and in the alternative decreed that upon failure to pay the money damages these defendants should wholly remove a structure directed by the Legislature to be built, and in part paid for by the City of New York, a public improvement, neither the State nor the City being before the court.

The Appellate Division, the intermediate court of appeal, affirmed the judgment in all respects, but by a divided court.

Upon appeal to the Court of Appeals, the court of last resort in the State of New York, it was open to that court to examine both of these questions. The decision of the Appellate Division not being unanimous it could have examined the record to ascertain whether there was any evidence to support the finding of the trial court that the plaintiff had suffered actual damage. If it had found that there was no such evidence the question would then have become a question of law, and it could have reversed the judgment on that ground. That they might have so found is evidenced by the dissent of Van Brunt, *P. J.*, of the Appellate Division, in the *Lewis case*, 40 App. Div., 343, 347, in the following language:

> "I do not concur in the prevailing opinion. It seems to me that the evidence entirely fails to show that the plaintiff has sustained any permanent damage by reason of the new erection upon which the railroad is now run. The structure existing at the

time of the change is shown to have been a greater *detriment to the* premises of the plaintiff than the present structure, and, consequently, no damages have been sustained."

The Lewis property was in the block between 114th and 115th Streets, immediately below the Muhlker property, and the evidence as to the damages was substantially similar to that in the case at bar.

In view, however, of the conclusion reached by the Court of Appeals as to the second proposition, that is, as to the extent and character of plaintiff's easements in Park Avenue, and as to the relation of defendants to the structure, it was not necessary for the Court of Appeals to consider the first question. The second question was one which it could examine and determine whether the decision of the Appellate Division was unanimous or not unanimous because it was a question of law to be determined upon facts conceded or not controverted. It determined this question in favor of defendants, and, since, with that determination, there could never be any recovery, not only reversed the judgment but dismissed the complaint.

The Court of Appeals, in reaching this conclusion, did not determine that plaintiff had no easements in Park Avenue; it did not determine that such easements as he had are not property; it did determine that no easements to which he was entitled had been appropriated, taken or interfered with by the defendants. Whether plaintiff had any claims which he could enforce against the State which directed and made the improvement, or against the City, for whose benefit the improvement had been made, it did not determine, for neither the State nor the City was a party to the action.

It seems to defendants that this was purely a determination as to the quantity and extent of the property of plaintiff, as to the rights of the defendants, and as to the

reserved powers of the Legislature, questions of local law solely within the jurisdiction of the State Court.

The situation may well be compared to a case wherein the plaintiff claims that he is the owner of a parcel of land of defined location and dimensions; that a railroad constructed, not in a public street, but upon land acquired in fee for that purpose, has physically encroached upon his land to his damage. The location and dimensions of his land depend upon the legal construction to be given to his deeds and other muniments of title. The trial court finds, in accordance with his contention as to the location and dimensions of his land, that there is, therefore, physical encroachment to his damage in a certain amount. The Railroad Company, having contended that all of its structures were upon its own land, the Court of Appeals determines that the trial court was in error as to its interpretation of the deeds and other muniments of title, and that upon a true legal construction thereof there is no encroachment, and therefore no actionable injury, and thereupon reverses the judgment and dismisses the complaint. It may very well have been that the consequential damage suffered by the plaintiff in such a case would be substantial, but it is well settled law in New York that there could have been no recovery, and whatever he might have said in the Court of Appeals in respect to the Federal Constitution it certainly would not be contended that he could bring to this Court any Federal question for review.

Without, in any manner, losing sight of the fact that it is immaterial in this Court whether the *judgment* of the Court of Appeals was right or wrong as to the character or extent of the plaintiff's easements, we shall pause to consider what conceded or uncontroverted facts it had upon which to base its judgment.

As we have already shown, the real question at issue was whether plaintiff's easements in Park Avenue were of

the same unlimited character and extent as the easements of abutters on Third and Sixth Avenues; in other words, was Park Avenue and the railroad structures therein to be distinguished from Third and Sixth Avenues and the elevated structures in those Avenues?

That there were certain very marked differences in the origin and history of these Avenues cannot be disputed. The Avenues in respect to which the elevated railroad litigation originated were actually opened, regulated, graded and paved, and in use as public streets long before the incorporation of the elevated railroad companies, and without reference to any railroad occupation. The easements appurtenant to abutting property had been created and at the date of the alleged trespass existed, unburdened with any railroad rights. The elevated companies entered upon these Avenues of their own volition and for their own profit, without claiming to have acquired any rights from abutting owners. They denied that whatever easements abutting owners had in such Avenues were property rights. They did not enter under any legal mandate. The most that they claimed—and all that they claimed—was legislative and municipal authority. Park Avenue, on the other hand, did not become a public street, in fact or in law, until more than twenty years after the incorporation of The New York and Harlem Railroad Company, and not until nearly twenty years after the construction of the railroad. It was then created a public street in only a partial and restricted sense. It has been held, over and over again, by the New York State Courts, that it was created subject to the right of the Railroad Company to maintain and operate its railroad therein, and the central portion never became a public street, in fact, until after the improvements under the Act of 1892. Nevertheless, abutters have always, since the conclusion of the street opening proceeding in 1853, had and now have an open street not

less than forty feet in width in front of their premises, not encumbered by any railroad structure whatsoever.

In 1831 the Legislature of the State, which had, by the Statute of 1807, authorized the map of 1811, and by the Statute of 1813 conferred upon the City power to open streets under the right of eminent domain, chartered The New York and Harlem Railroad Company. By that charter, it authorized the Company to locate its road in any avenue, opened or *unopened*, within certain limits, upon complying with certain formalities and upon obtaining the consent of the City. The formalities being complied with and the road located in Park Avenue, then unopened, with the consent of the City, embodied in the agreement of 1832, that location became a statutory location.

All proceedings taken thereafter in reference to the creation of Park Avenue as a public street were necessarily modified by these acts of the Legislature, of the City and of the Railroad Company.

The railroad having thus been located along the *unopened* avenue, the railroad company next went to the owners, or supposed owners, of the land within the lines of the avenue and of the land bounded thereby. It obtained deeds, substantially all of which were identical in form. Two of them, one from Peter Poillon and one from Benjamin L. Benson, are in evidence in this case. The land described in these deeds extended, in the one case northerly and in the other southerly from Harlem Lane and McGown's pass. The land described in the deed from Poillon extended northerly to about 121st street, and that from Benson southerly to about 106th street. It seems that up to a time shortly prior to the incorporation of the New York and Harlem Railroad Company these lands had been farming lands, and Benson, Poillon, McGown and others were the well-known owners of these farms. On the trial of this case, how-

ever, it appeared that some of these owners, prior to giving deeds to the railroad company, had executed instruments of cession to the City of the 100-ft. strip laid out on the map of 1811 as Park Avenue. This fact would not have affected the railroad company's rights under these deeds as against abutters if these grantors had, at the time of the giving of such deeds, been the sole owners of the abutting lots. It appears, however, in the case at bar, and it is a fact in some other cases, that these grantors had, prior to the giving of the deeds to the railroad company, sold some of the abutting lots. It does not appear in the case at bar to what extent Poillon and Benson were the owners of lots fronting or abutting on the avenue as then mapped, but it is a fact that they were the owners of some of the abutting lands.

The railroad company entered into possession under these deeds, claiming title in fee to the central 24-foot strip, with further rights for slopes and embankments. These deeds were identical in form with that in the *Conabeer* case, to which judicial construction was given both by the Court of Appeals and by the General Term. In the latter court (84 Hun, 34), at page 38, Follet, *J.*, writing the opinion which was concurred in by both Presiding Justice Van Brunt and Associate Justice Parker, says:

> "By the deed of January 18, 1832, Mrs. McGown, the former owner of the fee of the plaintiff's lot, conveyed to the New York and Harlem Railroad Company a strip of land twenty-four feet wide in the center of the avenue and extending from Ninety-seventh Street to One hundred and sixth Street. By the terms of this deed the grantee was authorized to construct a railroad on the land conveyed, with the right of extending the embankment on which the rails were to be laid to the exterior lines of the avenue. At the date of this conveyance the avenue was 100 feet wide, and on each side of the land conveyed and within the avenue there was a strip of

land thirty-eight feet wide, the title to which was not conveyed, *but the right to cover these strips with an embankment was expressly granted.* The embankment as now constructed is fifty-six feet wide, covering the land conveyed by Mrs. McGown and a strip sixteen feet wide on each side of the strip granted by her, which is *twenty-two feet less on each side of the strip conveyed than the defendants by the grant were authorized to use.* By the conveyance the grantee was authorized to construct a railroad on the subject of the grant, and if necessary, to occupy the whole width of the avenue adjacent to the grantor's remaining land. The grant of the right to construct a railroad carried with it the right to operate it when constructed, and the defendants could not have been held liable to Mrs. McGown for incidental damages caused to her remaining property by operating the road, without showing that the road was improperly constructed or negligently operated. The plaintiff stands in the shoes of her predecessor in title, and has no greater rights than she had. There is no assertion that the road was improperly constructed. On the contrary, the proof is that it was built in accordance with the statute of 1872, and the requirements of the city authorities, and it is not alleged or proved that the defendants have been negligent in the operation of the road."

Upon this construction of these deeds the evidence in the case at bar would have justified a finding that as against plaintiff defendants had acquired by possession adverse to the plaintiff, such rights as, independent of all other questions in the case, would have wholly defeated the plaintiff in this action.

The railroad being constructed in the central portion of this inchoate street, it was soon realized that, by reason thereof, the Avenue should be so widened as to provide for unobstructed streets for ordinary travel on each side of the railroad.

As a matter of fact, the Act of 1837 was enacted

upon the petition presented to the Common Council of the City and upon the application of the City to the Legislature. Although this petition is not in evidence in this case, it has been in evidence in a number of these cases, as appears by the statement of case in the *Conabeer case*, 156 N. Y., 474–478:

> "In 1835, the matter of widening Fourth avenue from one hundred to one hundred and forty feet was brought before the common council by a petition requesting that the avenue be thus widened. One, if not the chief, ground upon which this was asked was the existence of the railroad in the center of that avenue."

The next step in the history of Park Avenue is the street opening proceedings, commenced in 1850 and consummated in 1853. The learned Judge who wrote the opinion in the *Conabeer case* refers to this proceeding as follows (at page 486):

> "When this street was opened, the municipality assumed to acquire the title of the New York and Harlem Railroad Company to the property which it owned in Fourth Avenue, awarding it therefor the nominal sum of one dollar upon each lot. At that time, however, the municipal authorities and the legislature recognized the right of the railroad company to continue its road in the street and in no way disturbed its possession or the exercise of that right. * * * When the street was opened in 1853, the railroad was upon a high viaduct along the center of the avenue, which was in the sole and exclusive possession of the railroad, and no portion of it was occupied as a public street."

The property owned by Conabeer was at or near 104th Street. In front of her property the Railroad Company had constructed its road, having obtained from McGown the deed, construed in the *Conabeer case*, identical in form with that of the Benson and Poillon deeds, in evidence in the case at bar, and the fact that McGown had good title

and conveyed good title to the Railroad Company by said deed was not questioned.

Prior to the street opening proceedings initiated in 1850 and consummated in 1853, so far as the record shows, the City had taken no step whatsoever to create or accept Park Avenue as a public street, in any sense whatsoever. Whatever steps it then took, or whatsoever steps it has since taken in that direction, must be construed with reference to all of the acts of the Legislature and of the municipality, both with respect to the avenue and to The New York and Harlem Railroad Company, including the charter of the Company, the agreement with the municipality, of 1832, and the widening act of 1837. The effect of these acts and agreements, taken in connection with the practical construction given by the City to the effect of its proceedings in opening the street, in leaving the railroad in its statutory location as hereinbefore described; the railroad and structures as then existing and being used and operated being wholly inconsistent with street use, must surely have affected the character and extent of this avenue as a public street and the easements of abutting property owners. The railroad was there and occupied the central portion of the avenue. It was left there. Its use was a public use. In accepting or creating a public street or streets out of the 140-foot strip laid out on the map as Park Avenue, the City in no manner attempted to destroy the prior public use. Whatever easements of abutters came into existence upon or by virtue of opening the avenue as a public street came into existence subject to these railroad rights. Under the general rule that property already devoted to one public use cannot be taken, under general laws, for another public use, where the effect would be to extinguish the franchises, the City could not have acquired the right of The New York & Harlem Railroad Company to maintain and operate its railroad in

Park Avenue, under the general language of the Act of 1813. The situation was very similar to that in the case of the *Suburban Rapid Transit Co.* v. *Mayor*, 128 N. Y., whereof Judge Gray (at p. 523) says:

> "In the absence of express language, no implication of an intention to supersede the prior devotion to the public use of the plaintiff's railroad can be predicated upon the general terms of an act which does not require such by reason of some inherent necessity or for the attainment of an object not otherwise to be effected."

In that case the City had assumed to acquire, for park purposes, certain lands, including land which had already been acquired by the Transit Company for a roadway, but, although the lands sought to be asquired for park purposes were specifically described in an act of the Legislature, it was held that they were acquired subject to the right to maintain and operate the railroad.

We think that what we have already said sufficiently shows that the plaintiff's contention that this case is governed by the peculiar and wholly exceptional rule laid down by the New York State Courts in the Elevated Railroad cases cannot be sustained; that there must, of necessity, be a very marked and material difference between the rights of abutters in and over streets laid out and opened, unencumbered by any railroad rights or burdens, and abutters' easements on Park Avenue, opened, so far as it ever was, in the manner hereinbefore described.

The easements of abutting owners in New York City streets are aptly described by Judge Peckham in the *White case* (139 N. Y., 19, 25):

> "The easements of abutting owners in New York City, who are without title to any portion of the streets upon which their lands abut, differ somewhat in their origin from ordinary easements. They have not been created by grant or covenant, but

it is said of them that it is easier to realize their existence than to trace their origin; that they arise from the situation, the course of legislation, the trust created by statute, the acting upon the faith of public pledges and upon a contract between the public and the property owner, implied from all the circumstances, that the street shall be kept open as a public street, and shall not be devoted to other and inconsistent uses."

The history of Park Avenue has been different from the history of the avenues considered in the Elevated Railway decisions. The "situation," the "course of legislation," and action taken "upon the faith of public pledges" have all been different.

Such easements as are now appurtenant to property abutting on Park Avenue differed "in their origin" from the easements appurtenant to property abutting on other avenues in the city.

In their inception and creation they were modified by all the legislative and municipal acts which had gone before, and at the very moment in which they came into existence they were met by the fact that the title or right to the central part of the new avenue had theretofore been acquired by the railroad company; by the physical fact that the railroad was constructed and was being maintained and operated thereon; and also by all the potential rights and obligations of the railroad company under and by virtue of the acts of the legislature and of the municipality.

It was the legislative and municipal intent and purpose of the entire transaction that the 140-foot strip should be devoted to two public purposes, viz., railroad and street purposes (Suburban R. T. Co. *v.* Mayor, 128 N. Y. 510, 521).

Under the rights reserved to the legislature, the corporate life of The New York and Harlem Railroad Company might be terminated, the grade, the number of

tracks, the form of structure and method of operation might be altered, changed or modified, under the contract with the City, various changes might be enforced in the public interest, but the *franchise granted* to maintain and operate its railroad was property and could not be taken by either, excepting only by the exercise of the right of eminent domain, either by the State directly or by special authority conferred upon the municipality, and upon making compensation therefor (People *v.* O'Brien, 111 N. Y. 1).

The reserved right to require extensive alterations and modifications has been, at least, twice exercised; once in 1872 and once in 1892. Those commanded by the Act of 1872 were partly for the benefit of the railroad and partly for the benefit of the municipality. Those commanded by the Act of 1892 were wholly for the benefit of the public. There is no suggestion, in this case, that the Act of 1872 was not a valid exercise of the reserved power of the legislature.

The avenue having thus been opened to such extent as it was ever opened within the 140-foot lines designated by the Act of 1837, some twenty years after the location and construction of the railroad, leaving the railroad in the exclusive use and occupation of the central portion, actual street use was limited to the two strips of land, some 40 feet in width, on each side of the railroad. The Railroad Company was, therefore, left in its original location, and subject to the power of the Legislature, reserved in its charter (Section 18, Chapter 263, l. 1831) to "at any time alter, amend, modify or repeal" its charter; and subject, also, to the drastic reservations and conditions contained in the agreement of 1832 with the City.

In addition to the power reserved by the Act of 1831 to itself, the Legislature by the Act of 1872 asserted its undoubted province and power to exercise the rights reserved to the Municipality, and in such exercise thereof

directed the manner and form in which the railroad should be constructed in order to improve and regulate the use of the avenue. This was primarily a grade crossing act, the purpose expressed in the act being "for "the purpose of rendering the same safe and convenient "to any persons crossing the same, and the railroad "trains and passengers traveling thereon," was in the interest both of the Railroad Company and the municipality, and the expense thereof—some six millions—was borne equally by each. The form in which the act directed that the railroad should be constructed not only physically precluded the use of the central portion of about 60 feet for any street or highway purposes, but the act in terms provided that this central portion should be devoted exclusively to railroad purposes:

> "That the 'tunnel and railways shall be exclusively for the uses and purposes of said railroad company,' and it is made unlawful for any person other than a public officer, in the execution of his duty as such, 'to enter or pass upon or through the same, or any portion thereof, on foot or in any other way than in the proper cars of this corporation provided for that purpose.'" (101 N.Y., 327, quoting Section 9, Chapter 702, Laws of 1872.)

This Act of 1872 was a drastic instance of the exercise by the Legislature, not only of its reserved power in respect to The New York and Harlem Railroad Company, but in respect to this avenue, opened under the peculiar circumstances and conditions hereinbefore set forth. It attempted to, and did, deal with both subjects, on the theory that it had a right so to do, for the purpose of a public improvement, and upon the theory that its powers were in no manner restricted or curtailed by any rights or easements which abutting property owners had acquired in the avenue.

It will be noted that the Act of 1872 authorized and

directed the Railroad Company to make the improvements. Under the Act of 1892, here complained of, the Legislature, evidently regarding the improvement to be made as of a wholly public character, still further took the matter into its own hands by creating a board under whose direction and supervision the work should be carried out, in the interest of the public (including this plaintiff), to be benefited thereby.

The moving cause of the enactment of the law of 1892 was the act of Congress of 1890, requiring the raising of the bridge by means of which the railroad crosses the Harlem River. While it is not in evidence in this case, it is a fact, and appears in other of these Park Avenue cases, that a bill was introduced into the Legislature of the State of New York, the purpose of which was to authorize the change of grade of the railroad as fixed and established under the Act of 1872, to such extent only as was necessary in order to enable it to comply with the act of Congress. As appears in plaintiff's brief, and as a matter of fact, it was only necessary, for this purpose, to change the grade as far south as 125th Street. This bill passed both houses of the Legislature, but certain property owners (we cannot say that these included the plaintiff) objected to this bill, with the result that the bill failed to receive Executive approval. The demand of the property owners was that the entire avenue, south of 125th Street, should be opened up, and, in response to that demand, the Act of 1892 was enacted in the form in which it was, under which, not only without any benefit whatever to the Railroad Company but to its actual damage, its road was taken from the easy grade and solid earth roadbed provided under the Act of 1872, where it was economically maintained, free from grade crossings or other obstructions, and placed upon the present elevated structure, with steep grades and subject to expensive maintenance.

The situation immediately prior to 1892 is tersely described by Presiding Justice Van Brunt in *Tocci* v. *Mayor*, 73 Hun, 46, 51:

> "These railroad companies were in exclusive occupation of a part of the public streets of the City of New York. It was deemed by the Legislature advantageous to the City of New York that such occupation should cease, and that these portions of the streets should be restored to public use, and that the interruption of communication between the two sides of the City should terminate. * * * It is entirely immaterial in the consideration of this question whether the railroad company owned the fee of the land which they occupied or not. For all practical purposes they were its absolute owners, and entitled to its absolute control and exclusive use for the purposes of their railroads."

That the situation prior to the improvement made under the Act of 1892 was more satisfactory to the Railroad Company than that created by that improvement is evidenced not only by the physical facts but by all the expressions of the Court upon this feature of the litigation. The fact has also been directly in evidence in several of these cases which have been tried. In the *Fries case*, Ezra B. Naylor, an Assistant Engineer in the employ of the Railroad Company, testified as follows:

> "I am familiar with the requirements of the act of Congress, requiring the bridge over the Harlem River to be raised to a height of 24 feet above mean Spring tide. I know there was such an act passed. I prepared a plan to carry the railroad over such a bridge. To do that, it was necessary to change the grade, beginning at 125th Street and going northerly. That would have been sufficient for all railroad purposes." (See p. 154 of the Record in the *Fries case*, 165 N. Y., 270.)

In the *Lewis case*, Walter Katte, Chief Engineer of the Railroad Company, testified as follows:

> "I am familiar with the provisions of the Act of

Congress just put in evidence, which required the bridge over the Harlem River, used by The New York Central and Hudson River Railroad Company, to be raised 24 feet above the mean Spring tide. At the time of the passage of that Act of Congress in 1890, the grade of the railroad of the defendants was fixed by Chapter 702 of the Laws of 1872. The railroad companies, of themselves, had no right to change that grade. After the passage of this Act of Congress, which also provided that the change need not be made until the necessary State legislation should be had, I was called upon by The New York Central & Hudson River Railroad Company to prepare plans as to the method of complying with the Act of Congress, and I made investigations and prepared plans accordingly."

"Q. In order to comply with the Act of Congress, how far south of the Harlem River was it neccessary to change the then existing grade of the railroad?

"*Plaintiff's Counsel:* We object to that unless it is shown that those plans were carried out in the present construction. We object to any evidence of any plans that were not carried out and executed.

"Objection overruled. Exception to plaintiff.

"A. To 125th Street.

"There was no necessity whatever on the part of the railroad company, in order to comply with the Act of Congress, to change its grade any farther south. There was no necessity, for any railroad purposes, of changing its grade south of 125th Street. The four tracks which have been constructed under the Fourth Avenue Improvement of 1872 were entirely satisfactory to each of the railroad companies.

"Q. Was any attempt made to carry out these first plans of changing the grade south of 125th Street only, by preparing an act or otherwise?

Plaintiff's Counsel: We object to any evidence as to any attempt.

Objection overruled. Exception.

"A. An act was prepared and passed by the Legislature, but not signed by the Governor.

"Q. Who objected to the plans? A. Local interests and property owners." (See pp. 73 and 74 of the Record in the *Lewis case*, 162 N. Y., 202.)

The whole plan of the improvement, therefore, was in aid, not of the Railroad Company, but in aid of public improvements; first, in aid of the construction of the Harlem River ship canal by the Congress; and secondly, and so far as it related to the territory south of 125th Street, was for the improvement of the avenue and municipal benefit. South of 125th Street, prior to the improvement of 1892, and under the old improvement of 1872, many cross streets, including 115th Street, upon which plaintiff's premises front, were obstructed—that is, they stopped there and were cut off by the railroad structure. There were no means of access from one side of the street to the other at any point between the blocks, and only a few cross streets were carried over by bridges; so that there was a substantial interruption of traffic between that portion of the City lying to the easterly and that lying to the westerly of Park Avenue. Under the improvement of 1892, the solid earth and stone embankment from 111th Street northerly to a point opposite the plaintiff's premises was entirely removed. North of that point the cut was filled up and the space theretofore occupied by the solid embankment and by the cut, paved over, and became usable as a public street, giving the property owners direct and unobstructed access from one side of the avenue to the other.

One word upon the mandatory character of the Act of 1892: It is not claimed by the defendants that if plaintiff had sustained his contention that any of his *property* had been taken, that he could have been denied the right to compensation from someone, by reason of the mandatory character of the act. The fact, however, that the act not merely authorized but directed the specific improvement to be made, is a factor, and an important and material

factor, in the determination of the whole controversy. In the first place, it gives character to the entire improvement as a public improvement, and not merely one which the Legislature authorized the railroad company to carry out in case it should determine that it would be for its own interest to do so. Improvement was to be made without reference to the benefit to the Railway Company, but to its disadvantage. Secondly, the mandatory character of the act is important and material, in that it was an exercise, by the State, of its control over the streets of New York generally, and particularly over this avenue, under the circumstances under which it was opened. That such control is absolute, so far as the trusts upon which such streets are held by the City of New York are concerned, is well established (People *v.* Kerr, 27 N. Y., 128).

We have thus, at some length, stated the facts which were presented to the Court of Appeals and upon which that court was asked to determine the character and extent of the rights of plaintiff and defendants, respectively, the character of the improvement, and the powers of the Legislature in respect thereto. We think they are sufficient to show that that court, after long and very mature deliberation, decided the case justly and right.

The State Court had before it the question of defendants' claim of title, adverse to plaintiff and his predecessors in title, under the Benson and Poillon deeds; the more than sixty years of possession, occupation and use, also adverse, by the Railroad Campany; the extent to which Park Avenue had been opened; the character and extent of plaintiff's easements in aud over the avenue; the effect of all the acts and proceedings, both of the Legislature and of the municipality, in respect to the avenue and to the Railroad Company; and, finally, it had before it the open question as to whether, upon the whole case, plaintiff had or had not suffered any actual damage.

We respectfully submit that the determination of the court of last resort was a determination with respect to local property law, exclusively within its jurisdiction.

Plaintiff now asserts that he has rights under certain contracts—the deed of cession from Poillon to the City, and the deed from Poillon to plaintiff's predecessor in title. Assuming that, as between Poillon and plaintiff's predecessor in title, there was a contract, the full force and effect of which was, as claimed by plaintiff, viz., that the 100-foot strip designated as Park Avenue on the map should be forever kept open and wholly unobstructed (which we do not admit), was it not open and competent to the State Court, under the evidence in this case, to determine whether such contract rights were held and possessed, in their full force and integrity, by this plaintiff in 1892? Or that such contract rights have been legally lost, modified or curtailed? Poillon repudiated such contract rights when he executed and delivered the deed to The New York and Harlem Railroad Company, more than sixty years ago; the City repudiated any such contract rights when it entered into the agreement of 1832 with the Railroad Company; and the Railroad Company denied any such contract rights when it entered into possession under the Benson and Poillon deeds and the agreement of 1832, and constructed its railroad.

Plaintiff now further asserts that he has certain contract rights, subsisting between the parties to this action, by virtue of the fact that both claim under Poillon as a common source of title. The remarks of the foregoing paragraph apply with equal force to this alleged contract. Further, while he makes this claim in one breath, in respect to his contract rights, in the next he asserts that the deed from Poillon to the railroad company was wholly void. If it was wholly void, then plaintiffs can claim no contract rights under it. If it was not void, as defend-

ants claim, it served as a color of title upon which to found adverse possession.

Plaintiff now further asserts that he has a contract, arising out of the decision of the State courts in the elevated railroad cases, made prior to the purchase, by plaintiff, of his property on Park Avenue. This he alleges arises by virtue of the decision of that court in the elevated cases, determining that the easements appurtenant to property abutting on streets or avenues in the City of New York, opened under the Act of 1813, were property and could not be taken without compensation (Plaintiff's Brief, pp. 30, 31). There is, however, in this case no evidence whatsoever that that portion of Park Avenue upon which the structures complained of are situated was opened under the Act of 1813. On the contrary, plaintiff, in respect to the street-opening proceedings, expressly demanded and had a stipulation to the effect that these street-opening proceedings were introduced in evidence simply to show the widening from 100 to 140 feet (Record, p. 34).

Plaintiff now also asserts that he has been deprived of his property without due process of law. Did he not have his day in court? Did he not have a full opportunity to be heard and to present his propositions of law and his evidence? That he had such opportunity is conclusively shown by the fact that he recovered a judgment in the court of original jurisdiction. He chose his own forum and form of action, bringing his suit in equity in the Supreme Court of the State of New York. In the State of New York compensation for property taken or to be taken by a corporation having authority to exercise the right of eminent domain is ascertained in one of two methods, different in form of procedure, but not at all in substance:

In the one, the corporation desiring to acquire property which it does not claim to own, initiates a proceed-

ing under the Condemnation Law, in accordance with the provisions of which Commissioners of Appraisal are appointed, who determine the amount of compensation to be paid.

In the other, the owner—or alleged owner—claiming that his property has been taken, initiates a proceeding, and becomes a plaintiff in an action in equity; in form, demanding an injunction and, as an alternative, money damages, past and future; in substance, the action is brought to ascertain the amount of compensation. The one is brought when the corporation admits that it requires the property of another; the other is brought when the owner—or the alleged owner—asserts that his property is taken, and that fact is denied by the corporation. The case at bar is of this latter character.

At the trial in the court of original jurisdiction, the plaintiff asserted that, being the owner of that lot abutting on Park Avenue, as appurtenant to such lot, he had certain rights and easements in Park Avenue, and that defendants had trespassed upon—that is, *taken* the said easements, or some of them.

Defendants denied that they had trespassed upon or taken any easements or property of any kind, owned by plaintiff.

In the Special Term of the Supreme Court, after a full and fair trial, plaintiff was successful so far as the structure erected under the Act of 1892 was concerned. Both parties appealed to the Appellate Division of the Supreme Court, and in that court the plaintiff sought to sustain the judgment, except that he claimed he had not been given relief to as full extent as he was entitled. The defendants sought to overthrow the judgment. After full argument in that court, the judgment was affirmed.

After full argument in the Court of Appeals, that Court decided, as a matter of law, upon conceded or uncontroverted facts, that none of the easements or property of

the plaintiff had been trespassed upon or taken by the defendants, reversed the judgment in all respects and dismissed the complaint.

We have hereunder called attention to the manner in which the case came to the Court of Appeals, and to the jurisdiction of the Court of Appeals in respect thereto.

We now come to the question, raised by the plaintiff for the first time in the Court of Appeals, that the Act of 1892 is unconstitutional.

Our position is that the constitutional question not only was not raised by the pleadings, but, in the very nature of the case, it could not have been raised in this form of action; that, as a matter of fact, it was not even suggested until reaching the Court of Appeals, and that it was then an afterthought which came after the decision in the *Fries case*, which involved disaster to plaintiff, on the issue which he had tendered in the lower courts

We shall, however, assume that as a matter of practice plaintiff is properly in this court. Whether he is or not, it would not be of advantage to defendants to have it here held that, on any technical question, the plaintiff is not properly in this court. As has already been stated, there are many other actions of this same character, and we are content that this case be decided on whatever merit there may be in plaintiff's contention.

Chapter 339 of the laws of New York of 1892 does not take the plaintiff's property without due process of law within the meaning of the Fourteenth Amendment.

1. The statute, read in connection with the charter of the Harlem company, provides for compensation, therefore due process of law.

It will be observed that this action is against the New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company—*no one else*—and the claim is that *those companies* have taken plaintiff's easements of light and air, &c., and judgment of injunction is prayed against *them* only.

Chapter 339 Laws 1892 *commands* those companies to place the Harlem Company's railroad upon the structure erected by the State, and to run the trains upon it.

Section 8 of the charter of the Harlem Company (chapter 263, Laws 1831, Supp. to Brief, p. 8) provides, in the usual way, for the *taking* by that company, by condemnation, of "lands and real estate," upon compensation, of course. The words "real estate" in New York include easements. They are the only words used in the "general railroad act" and the act under which the elevated railroads were built. The Railroad Law of New York, which now applies to all railroad companies in the State, uses (§ 7) the words "real property or of any right, "interest or easement therein," and by the Condemnation Law payment is regulated in advance (Code of Civil Procedure, §§ 3357–3373). Read in connection with the charter of the Harlem Company and the Railroad Law, Chapter 339 of the laws of 1892 of New York provides for compensation for the taking of all real estate and is constitutional.

Adirondack Railway Co. *vs.* New York State, 176 U. S., 335.

Section 3359 of the Code provides that "*whenever* any person is authorized to acquire title to real property for public use by condemnation, the proceeding for that purpose shall be taken in the manner prescribed in this title." Section 7 of the Railroad Law provides, among other things, that if a railroad company is unable to agree for the purchase of any real property, or of any right, interest or easement therein, required for the purpose of its incorporation, it shall have the right, "where its railroad shall be lawfully in possession of a lessee, mortgagee, trustee or receiver, and additional real property shall be required for the purpose of running or operating said railroad," to acquire such real property by condemnation. This was the law at the time of the enactment of Chapter 339 of the Laws of 1892. It is, therefore, perfectly apparent that if these defendants have taken or if they require any of plaintiff's property, for the purpose of operating the road, there is ample authority to acquire such property by condemnation, and it was not at all necessary to insert any of these various provisions, or any reference to them, in the Act of 1892. They must be read together.

Under the *Dolan case* (175 N. Y., 367, Supplement to defendants' brief, 111), and also the *Ketcham case* (177 N. Y., 247, Supplement to defendants' brief, 113), the Court of Appeals, having determined that for any property taken for station purposes, outside of the steel viaduct, the defendants are liable to compensate the plaintiff, it is now open to the defendants to either have the compensation ascertained in the actions already brought, or to have it determined under the Condemnation Law.

If express provision had been made in the Act of 1892, that compensation should be made for all *property* taken or required for the purposes of the improvement, either by purchase or by condemnation, this plaintiff would then have been met with the same question with which he is

met in this case. No provision in the Act of 1892 would have aided him except a provision that compensation for all *consequential damages* to private property, caused by the making of the improvement, should be made, and should be determined either by agreement or by condemnation.

The jurisdiction of this court entitles it to review the action and judgment of the state court upon any and every question wherein the judgment of the state court shall be found by this court to have involved questions arising upon the inhibitions of the federal constitution upon which the records shows the plaintiff in error here to have relied and insisted in the state court. The jurisdiction of the state court in these particulars involved the consideration and determination of the questions of violation of inhibitions of the federal constitution in so far as they appear upon the record to have been raised in the state court, and were in fact involved in the issues which the case presented for determination and adjudication. The case alleged in plaintiff's complaint is destitute of any allegation that the acts of the defendant railroad companies transcended in any respect their charter powers, or that the railroad companies were in any wise wanting or lacking in the charter powers requisite for the doing of the things complained of, or for acquiring whatsoever property right was requisite unto the lawful doing of those things as against plaintiff. Without specifically so alleging in so many words, the complaint assumes that the defendant railroad companies had the charter right and power to acquire from plaintiff, upon compensation, whatsoever property or property right of his, if any, was requisite unto the rightful maintenance and operation, as against him, of the railroad upon and with the structure described in his complaint. In consonance with that theory of the complaint was the prayer thereof

"that the defendants be enjoined," etc.,

"or that the court shall determine the amount

of damages to the fee value of said premises in consequence of the appropriation by defendant of plaintiff's said easements, as aforesaid, amounting," etc. "and that unless the defendants shall forthwith pay the same to the plaintiff the defendants be enjoined from using the said elevated railway structure and depression, and from continuing the same opposite said premises."

The answer of the defendants contained nothing antagonistic to this theory of the charter powers of the defendant which the complaint in manner aforesaid assumed. The defendants did not at any stage of the case, or in any court, either directly or indirectly, set up any claim to the effect that if the structure and its use, or either thereof, should be found to take or invade any property or property right of the plaintiff, that the defendants could not be held answerable to compensate for the property or property rights so taken or invaded; hence if by any possibility any question might or could have been made, either by reason of absence of provision for compensation in chapter 339 of the laws of 1892, or upon any other ground whatsoever, regarding the sufficiency or adequacy of remedy in plaintiff's favor available to him whereby to recover such compensation, no state court was asked to determine such question, and the record is barren of any indication that it undertook or assumed to do so. The pure, simple and sole ground upon which the plaintiff was defeated by the judgment of the Court of Appeals of the State was that all of the things of which plaintiff complained, and by which the proof tended to show that he had suffered loss and damage, were within the rights which the state, the municipality and the railroad had acquired as against plaintiff's predecessors in title, and plaintiff; that no property of his had been taken, that no property right of his had been invaded, and hence that in so far as, if at all, plaintiff had suffered loss or damage consequent upon the acts of which

he complained, such loss or damage was not accompanied by nor consequent upon any legal wrong, and hence was within and governed by the doctrine of *damnum absque injuria*. Obviously, then, it is an indispensable prerequisite to jurisdiction of the question as to whether chapter 339 of the laws of 1892 constitutes, as against plaintiff, a violation of the inhibitions of the federal constitution in the particulars asserted by him, that a court possessing the jurisdiction so to do, and whose jurisdiction is in that behalf invoked, shall first adjudge that the Court of Appeals of the State of New York committed error in reaching the conclusion and judgment that plaintiff's property had not been taken, and his property rights had not been invaded by that enactment, or by action taken and had under and in pursuance of its authority.

While not at all admitting that this court is possessed of jurisdiction, nor that its jurisdiction has been invoked in any competent method or way to determine that the state court erred in thus determining and adjudging against plaintiff in the particulars above specified, let it be assumed, for the sake of the argument, that such jurisdiction of this court is both possessed and invoked.

The questions to which we would be thus led are:

1. Is chapter 339 of the laws of 1892, as against plaintiff, violative of the inhibitions of the federal constitution, in that it provides for the taking of his property, or invasion of his property rights, without due process of law?

2. Is chapter 339 of the laws of 1892, as against plaintiff, violative of the inhibitions of the federal constitution in that it impairs the obligations of a contract, in and by depriving him of or diminishing the legal scope of his remedy or remedies to which he was entitled upon and in respect of such contract?

In so far as this enactment operated as or had the effect of an amendment or alteration of the charter of the Harlem Railroad Company, it is within the doctrine of *pari materia*, which suggests and requires that it be read in connection with the existing charter upon which such amendment is incorporated, and in connection with the General Railroad Law, the Condemnation Law, and the Code of Civil Procedure, wherein and whereby provision is made empowering the Harlem Company to take property for the purposes of its incorporation, and providing for notice of and hearing in an orderly proceeding preliminary to determination and adjudication of compensation for property and property rights to be for those purposes acquired and taken.

Sections 8 and 9 of the charter of the Harlem Company, shown upon pages 3 to 5 of the supplement to brief of defendants in error, provide the charter power applicable for the acquirement of property requisite for the corporate purposes, and when by chapter 339 of the laws of 1892 these charter powers or obligations were, if they were, enlarged so that they transcended the scope of the property right which the company then possessed, there can be no question that this authority for the acquirement of property was in like manner enlarged and extended, and thus constituted that plain and adequate method and remedy which constitutes due process of law.

Moreover, the Railroad Law of New York, chapter 39 of the General Laws, is applicable to the Harlem Railroad Company as to all other railroad corporations of the State, as are also the provisions of the Code of Civil Procedure, sections 3357 to 3371 prescribing the orderly method of notice and hearing as the basis of orderly determination and judgment.

The original brief of the defendants in error, at pages 20 to 22, sets forth quite at length quotations from the adjudications of the Court of Appeals of the State of New

York, showing that the proceeding which plaintiff made choice of in this case is one well recognized by the courts of the state as suited to the administration of and wherein they do administer the law in such wise as by and resultant upon orderly hearing and determination, they adjudge the rights of those who in such method assert that their property rights have been taken, and invoke adjudication of compensation in respect thereof, the same principle of remedy and measure of remedy as would be accorded under the statutory proceeding above mentioned.

As has been stated above, plaintiff assumed this as the basis of his choice of method of procedure, and as the foundation thereof, and neither court nor counsel has at any stage or in any court in any wise questioned the soundness of plaintiff's assumption in this regard.

If upon any view of the record it can be said to show that plaintiff has established either that his property has been taken, or his property rights invaded, or he deprived of the benefit of any contract obligation, whatsoever may have been the cause of his failure of obtaining a remedy and satisfaction in respect of such taking or invasion of his property or property rights, or deprivation of contract obligation rights, they have not, nor have any of them, resulted from any want of due process of law, or impairment of contract obligation.

We respectfully submit that the petition in error should be dismissed for want of jurisdiction, or that the judgment should be affirmed.

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